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JUN 5 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 94-54, FCC Docket No. 95-149

Dear Mr. Caton:

In accordance with Section 1.1206(a)(2) of the Commission's Rules, 47 C.F.R. § 1.1206(a)(2), notice is hereby given of an *ex parte* communication in the above-captioned docket. Today, Mark Golden of the Personal Communications Industry Association (PCIA) and Bob Pettit and myself of Wiley, Rein & Fielding met with Michele Farquhar and John Cimko of the Wireless Telecommunications Bureau staff.

The purpose of the meeting was to discuss two issues -- the imposition of resale obligations on broadband PCS operators and the need for a PCS-to-cellular roaming requirement. The topics discussed are fully reflected in the attached documents. Copies of the document concerning PCS resale were left with those present at the meeting. Although copies of the PCS roaming document were not distributed at the meeting, the document reflects the issues discussed in the roaming context.

In accordance with the Commission's rules, two copies of both documents are being submitted for inclusion in the docket file.

If you have any questions, please do not hesitate to call me at (202) 828-4452.

Respectfully submitted,

Karen Kincaid

Karen Kincaid
Wiley, Rein & Fielding

Enclosures
cc: Karen Brinkman

A MANDATORY RESALE REQUIREMENT FOR BROADBAND PCS OPERATORS IS UNNECESSARY AND INCONSISTENT WITH THE OBJECTIVES UNDERLYING THE TELECOMMUNICATIONS ACT OF 1996

Recent legislative and marketplace developments make clear that a mandatory federal resale requirement is neither appropriate nor necessary as applied to broadband Personal Communications Services (PCS) operators. In view of the level of competition emerging in the commercial mobile radio service (CMRS) industry generally and the role of resellers as a natural component of the PCS distribution chain, the wisest course is for the FCC to allow resale arrangements to develop through the actions of market participants, not as a result of federal regulatory mandates.

- The Commission first imposed an affirmative resale obligation on wireline telephone carriers in the age of monopoly telephone providers. At that time, affected markets were highly concentrated and far from competitive. A mandatory resale obligation was viewed as a means to exert pressure on carriers to provide services at more competitive rates. Similarly, the decision to impose a mandatory resale requirement on cellular carriers was premised on a desire to minimize the headstart advantage of wireline licensees and open the cellular duopoly to additional competition.

- An affirmative resale obligation has never been imposed on an emerging service that will be part of a robustly competitive industry with no demonstrated need for federal regulatory intervention, as is the case with broadband PCS, narrowband PCS, and paging. In fact, paging provides a particularly useful example because, without ever having an affirmative resale requirement, paging has evolved into a highly competitive industry in which resale has flourished on its own.

- The Commission has recognized that the wireless marketplace is characterized by increasing competition. Broadband PCS is expected to be available on a widespread basis later this year, and the FCC's spectrum allocation scheme guarantees the emergence of at least three, and possibly as many as six, new competitors to cellular in each market. In addition, wide-area specialized mobile radio (SMR) operators are expected to offer services competitive with cellular and broadband PCS, as will some paging and narrowband PCS providers.

- As the Commission witnessed with paging, in a competitive market, an affirmative resale obligation is unnecessary -- sufficient incentives exist to allow effective resale without federal regulatory intervention. Moreover, because the goal of a mandatory resale requirement is generally to promote competition, it is difficult to identify any benefit that will accrue from an affirmative resale obligation.

- Furthermore, as with paging, broadband PCS operators have an incentive to promote distribution of their services through the use of resellers. In particular, because broadband PCS licensees face extremely high spectrum acquisition and operating costs, resale offers a cost-effective way to maximize system usage while minimizing operating expenses. As a case on point, NextWave Personal Communications, Inc., the leading bidder in the C-block auction, recently announced that it plans to operate solely through resellers with no retail customers of its own.

- In addition to market forces, the spirit of the Telecommunications Act of 1996 dictates against the imposition of a mandatory broadband PCS resale obligation. In particular, new Section 10(a) of the Act directs the Commission to forbear from applying any regulation or provision of the Act if: (1) enforcement is not necessary to ensure that the charges, practices, classifications, or regulations for or used in connection with that carrier or telecommunications service are just and reasonable; (2) enforcement is not necessary for the protection of consumers; and (3) that forbearance is consistent with the public interest.

- PCIA submits that the same analysis ought to apply where the imposition of a new regulatory requirement is at issue. Similarly, Congress has stated that, in enacting the 1996 Act, it sought to establish "a pro-competitive, deregulatory national policy framework." Consistent with this goal, the Commission must ensure that any new regulatory requirements can be sufficiently justified -- as outlined above, this simply cannot be done in the context of a broadband PCS resale requirement.

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In adopting resale ground rules and assessing the proper role of federal regulatory intervention in the PCS context, the Commission must be mindful of the applicable marketplace characteristics. Where a marketplace is highly competitive and facilities-based service providers have strong incentives to maximize system usage, experience in the paging context has shown that resale will flourish without the imposition of unnecessary and costly federal regulatory requirements. This is precisely the case with broadband PCS. Accordingly, PCIA urges the Commission to refrain from imposing a mandatory federal resale requirement on broadband PCS operators.

PCS Roaming: *Critical to the Success of CMRS Competition.*

As the FCC has recognized, the ability of CMRS operators to "roam" is of critical importance to a "competitive CMRS marketplace". *Second Notice of Proposed Rulemaking,* 10 FCC Rcd 10666 at ¶¶ 54, 58 (April 28, 1995). However, the mission has neglected to *require* cellular companies to provide roaming capabilities for PCS providers -- opting instead to rely on "marketplace forces" and to "monitor the development of roaming service and to police actively any denials of reasonable requests for roaming agreements". *Id.* at ¶ 58. PCIA has become convinced by the record generated in response to the *Second Notice* and by marketplace developments that it is crucial for the Commission to require PCS-to-cellular roaming on the same basis as the Commission requires cellular-to-cellular roaming.

Background.

Historically, the FCC has required cellular companies to allow cellular-to-cellular roaming. In fact, that policy is now reflected in the agency's rules: "[c]ellular system licensees must provide cellular mobile radiotelephone service upon request to all cellular subscribers in good standing, including roamers, while such subscribers are located within any portion of the authorized cellular geographic service area . . . where facilities have been constructed and service to subscribers has commenced." 47 C.F.R .§ 22.901.

Accordingly, it is simply not true, as suggested by some parties,[1] that cellular roaming appeared solely through market forces without FCC involvement.

While the FCC so far has declined to adopt similar rules for PCS-to-cellular roaming, the Commission has nonetheless recognized the pivotal role that roaming will play in the acceptance and success of PCS.

In fact, in its *Second Notice* the Commission stated that "[r]oaming capability is an increasingly important feature of mobile telephone communications" -- one that the Commission "should take any steps necessary to support". *Second Notice*, ¶ 54.

[1] *Comments of BellSouth* at 5.

What's the Market Incentive of Incumbent Cellular Providers?

In tentatively declining to require cellular companies to offer PCS roaming, the FCC appears to believe that market incentives will ensure that cellular incumbents will provide roaming capabilities to PCS systems -- a view shared by a number of cellular incumbents themselves.

"Each cellular operator may find it to be economically beneficial to deny roaming or to charge higher prices for roaming in certain cellular MSAs to make PCS less desirable to consumers who place a high value on roaming."

-- Dr. Jerry A. Hausman, McDonald Professor of Economics, MIT.

But exactly what this incentive will be is not clear. As BellSouth says, cellular incumbents already enjoy the benefits of an "existing nationwide seamless cellular roaming system".[2] Whatever incentive cellular companies had to permit cellular-to-cellular roaming (encouraged, of course, by a functional FCC requirement), they gain nothing more from providing this same roaming capability to potential PCS competitors.

Lack of PCS Roaming Capability Provides Incumbent Cellular Companies with a Marketing Pitch -- Not an Incentive to Permit PCS Roaming.

Whatever economic theories can be presented regarding cellular companies' incentives, the best proof of the real incentives can be found in cellular companies' behavior when confronted with actual competition from PCS operators. That behavior is not encouraging to the development of CMRS competition.

The recent introduction of PCS competition in the Washington/ Baltimore market has been accompanied by substantial advertising campaigns -- both by the nascent PCS provider and by incumbent cellular providers. The PCS provider's advertising invariably talks about price, additional telecommunications features, and signal clarity.

However, virtually without exception, advertising by incumbent cellular providers focuses almost exclusively on the lack of roaming capability by PCS operators.

[2] *Comments of BellSouth* at 5.

Clearly, while incumbent cellular providers may offer economic theories about how "foregone profit opportunities" will ensure that PCS providers get roaming capabilities, the behavior of those cellular providers in the market is quite different. As Dr. Jerry A. Hausman, McDonald Professor of Economics at MIT, stated in this proceeding, theories about "foregone profit opportunities" fail "to consider the increase in revenue that a cellular provider would gain in a region if PCS is made less attractive by its inability to provide out of region roaming services".[3] Whatever incumbent cellular companies may be telling the FCC, their behavior in the marketplace tells a quite different story.

"How [do] Sprint Spectrum wireless users make calls outside the greater Washington/Baltimore area[?] It's simple, if they have a quarter. Because once they leave Sprint's very limited service area, their wireless phone can't make a call."

-- Bell Atlantic NYNEX Ad, *Washington Post* 12/19/95

PCS-to-Cellular Roaming Is Technically Feasible and Can Be Implemented Without Imposing a Burden on Cellular Incumbents.

One of the apparent fears of requiring PCS-to-cellular roaming is that cellular companies (and ultimately users) will wind up footing the bill to implement technical features for the benefit of PCS.

But this need not be the case at all. Both Pacific Bell Mobile Services and APC have proposed roaming requirements that will put the burden on PCS operators. Under these plans, PCS operators will bear the burden of distributing dual-mode, dual frequency handsets -- due to become available in the second quarter of 1996 -- to PCS customers. Calls made on such handsets will appear no different to the cellular network from any other cellular call. Accordingly, handling these calls will require no additional equipment investment and should impose no costs for the incumbent cellular provider beyond those imposed by cellular roaming agreements.

[3] *Ex Parte* Affidavit filed by Pacific Telesis Mobile Services and Pacific Mobile Services at 7-8.

Section 22.901 Alone Does Not Appear to Be the Answer.

Some parties contend that Section 22.901 is "sufficiently broad to foster PCS roaming services without imposing undue costs upon the CMRS industry".[4] Yet, it is not apparent at all from the face of Section 22.901, which deals with cellular customers, that the rule will afford protection from failure of cellular companies to offer roaming to PCS customers. As Bell South has already noted, a PCS customer, even one with a dual-mode phone, is simply not a "'*cellular* customer in good standing'".[5] Accordingly, if the Commission's policy to promote competition in the mobile voice marketplace is to be realized, it must affirmatively state that the roaming policy embodied in Section 22.901 is intended to apply to PCS providers and customers.

What Is the Answer?

As the FCC has recognized, roaming capabilities are critical to the development not only of PCS but of the mobile "network or networks" envisioned by the Commission. The mounting evidence of the marketplace illustrates that incumbent cellular providers have the incentive and ability to deny PCS operators roaming capabilities. Accordingly, PCIA believes that the FCC should simply require that incumbent cellular operators offer roaming capabilities to PCS operators on a non-discriminatory basis. In essence, PCIA asks that the Commission apply its long-standing cellular-to-cellular roaming policy to PCS providers.

Such a policy would not impose additional costs on the cellular industry. It would not require the technically impossible of cellular incumbents. As in the cellular industry, it would not require a heavy regulatory hand in private negotiations. But most fundamentally, it would help fulfill the competitive promise offered by PCS providers.

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[4] *Comments of CTIA* at 19-20.

[5] *Comments of BellSouth* at 5.